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JUDICIAL DISCRETION IN THE LAW OF TORTS. — We need, says Dean Pound, a movement “for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place, and relegating logic to its true position as an instrument.”¹ Nowhere is this more true than in that most human department of legal relations — the law of torts. Nowhere is it more true than when we are dealing with the relation between the occupier of land and the category of persons called trespassers — that rather inferior breed of outlaws² who have only lately come to be recognized as human beings.³ Yet in few instances have the courts been more slow to recognize the danger of destroying principles with syllogisms.

A springboard, attached at its base to the property of the New York Central Railroad Company, extended out more than seven feet over the waters of the Harlem River, a public watercourse. A boy, swimming in the river, climbed upon the springboard and stood at its end, prepared to dive. Through lack of ordinary care on the part of the railroad, a pole

¹ Roscoe Pound, “Mechanical Jurisprudence,” 8 COL. L. REV. 605, 609.

² This statement should not, of course, be taken too strictly. Much talk of the sort has, however, led a court naively to deny that the trespasser is an outlaw. See *Brooks v. Pittsburgh, etc. R.R. Co.*, 158 Ind. 62, 69, 62 N. E. 694, 696 (1902.)

³ For a concise and accurate statement of the law regarding the duty of an occupier to trespassers — which has not changed materially in the quarter-century since the statement was made — see Jeremiah Smith, “Liability of Landowners to Children Entering Without Permission,” 11 HARV. L. REV. 349-350.

supporting high-tension electric wires on its property gave way; the falling wires struck the boy and swept him to his death in the waters below. The New York Court of Appeals allowed the proper parties to recover for a negligent killing.⁴ Judge Cardozo wrote a brilliantly human opinion. Three judges dissented.

Now here is a case which, if decided in the usual way upon "assumed first principles," would present an opportunity for many of the extreme niceties of judicial logic. Was this board such a part of the railroad's property that it might maintain an action of trespass *quare clausum fre-git* against the boy for treading upon it? The better view seems to be the negative — that such encroachments as this springboard upon public property may be treated either as disseisin, so as to give the encroaching owner possession, or as mere trespass; but that the election is with the state.⁵ Here is one ground upon which the case might have gone — that the railroad was not so in possession of the property as to constitute the boy a trespasser. But passing over that, — was not the defendant liable on the principle that one who negligently maintains in a dangerous condition premises adjacent to a public highway (such as this water-course) is liable for injuries caused thereby to persons using the highway? This is a principle which seems well fixed in the law,⁶ but which in its application leads to many complications.⁷ Traced through its mazes, this might provide another ground upon which to rest the case. Then, if we assume the boy to be a trespasser, we must ask whether he was killed by the falling wires negligently maintained as a dangerous condition of the premises,⁸ or by the electric current passing though the wires as an active course of conduct. If the latter is true, it leads us into the whole mass of dispute over perceived and unperceived, anticipated and unanticipated trespassers, and the complex deductions from these strict categories.⁹ We might even remand the case to determine whether the wires touched the boy after he left the springboard — *i. e.*, whether they struck him when he was not technically a trespasser!

But the majority opinion will have none of this. Judge Cardozo sweeps away all deductive tangles. He cannot see the difference between the relation of this human being to this corporation when he is a technical

⁴ *Hynes v. New York Central R. R. Co.*, 131 N. E. 898 (N. Y., 1921). See RECENT CASES, *infra*, p. 94.

⁵ *McCourt v. Eckstein*, 22 Wis. 153 (1867); *Butler v. Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906); *Murphy v. Bolger*, 60 Vt. 723 (1888).

⁶ *Beck v. Carter*, 68 N. Y. 283 (1877); *Chickering v. Thompson*, 76 N. H. 311, 82 Atl. 839 (1912); *Hutson v. King*, 95 Ga. 271, 22 S. E. 615 (1895).

⁷ Thus there is, it seems, no liability when the traveller wanders from the path intentionally or unnecessarily. *Lorenzo v. Wirth*, 170 Mass. 596, 49 N. E. 1010 (1898); *Johnson v. Laundry Co.*, 122 Ky. 369, 92 S. W. 330 (1906). Or when a person approaches the dangerous spot from another direction than from the road. *Dobbins v. Missouri K. & T. Ry. Co.*, 91 Tex. 60, 41 S. W. 62 (1897). Some wooden courts have run up against a logical difficulty in this subdivision, and have refused to allow recovery unless "it be conceded that because of the nearness of this stairway to the sidewalk, the plaintiff might be injured by it without becoming a trespasser on the defendant's property"! *Collins v. Decker*, 120 App. Div. 645, 105 N. Y. Supp. 357, 359 (1907); *Sheehan v. Bailey Building Co.*, 42 Wash. 535, 85 Pac. 44 (1906). Cf. *Beck v. Carter*, note 6, *supra*.

⁸ The general rule is that a trespasser takes the risk of the condition of the premises. *Lary v. Cleveland R. Co.*, 78 Ind. 323 (1881).

⁹ See note 3, *supra*.

trespasser with his feet upon the springboard, and when he is immersed in the public river immediately below, or is even clutching the board with his hands, or when he is a few inches in space above it, jumping through the air. "Rights and duties in systems of living law," he says, "are not built upon such quicksands."¹⁰

Now this smacks strongly of the capricious personal brand of justice dispensed by an Oriental monarch, and therein lies its danger. But somewhat of this discretionary element must be injected into our jurisprudence if we are to escape an absolutely mechanical system of law. For no matter how wide or how narrow we make our categories, there will always be borderline cases which fit into more than one of them.¹¹ It is here that set rules must be abandoned and resort must be had to the fundamental interests that lie behind them. It is in weighing and balancing these interests that the discretionary element must enter. When rules conflict and collide, judges must have regard for "the human conditions they are to govern."

The decision in this case does not establish any new principle in the law of torts. In future citations it will probably be resolved upon either of the first two points mentioned in analyzing it. But it does represent a distinctly new spirit in judicial method — a spirit which will refuse to uphold abstract categories and formal deductions to the detriment of individual and social interests; a spirit which will "relegate logic to its true position as an instrument."

EXCISES AS PROPERTY TAXES.—Many state constitutions provide that all property shall be taxed uniformly in proportion to value.¹ These provisions are often held to prevent even a difference in the rate of taxation between realty and personalty,² and certainly do not allow a single article to be selected for a general tax at a higher rate.³ At the same time, practical considerations make it desirable that property taxes

¹⁰ See *Hynes v. New York Central R. R. Co.*, *supra*, note 4, at p. 899.

¹¹ Judge Cardozo's opinion concludes: "There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu*. They must be reformulated and readapted to meet exceptional conditions. Rules appropriate to spheres which are conceived of as separate and distinct cannot be enforced when the spheres become concentric. There must be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still in public waters in the exercise of public rights. The law must say whether it will subject him to the rule of one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption and place him in the field of liability and duty." *Hynes v. New York Central R. R. Co.*, *supra*, note 4, at p. 900.

¹ See 1 COOLEY, TAXATION, 3 ed., 274; JUDSON, TAXATION, 2 ed., § 503, and pp. 769 *et seq.*

² *Savannah v. Weed*, 84 Ga. 683, 11 S. E. 235 (1890). See *First National Bank v. Holmes*, 246 Ill. 362, 369, 92 N. E. 893, 895 (1910).

³ *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916); *State v. Cumberland & Pennsylvania R. R. Co.*, 40 Md. 22 (1873).